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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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June 29, 2012

VIA ELECTRONIC TRANSMISSION

The Honorable Ronald C. Machen, Jr.
United States Attorney
District of Columbia
United States Department of Justice
555 Fourth Street, NW
Washington, DC 20530

Dear U.S. Attorney Machen:

Last night, the Deputy Attorney General sent a letter to the Speaker of the House of Representatives saying:

The Department has determined that the Attorney General's response to the subpoena issued by the Committee on Oversight and Government Reform does not constitute a crime, and therefore the Department will not bring the congressional contempt citation before a grand jury or take any other action to prosecute the Attorney General.¹

It is odd that this letter arrived before the House of Representatives had even transmitted the contempt resolution adopted yesterday to you as the "appropriate United States Attorney" under 2 U.S.C. § 194. Under that statute, the appropriate U.S. Attorney's "duty . . . **shall** be to bring the matter before the grand jury for its action."²

This language is quite clear and simple to comprehend. It is not optional.³ Moreover, the law clearly assigns that duty to you and to no one else. It could have assigned the duty to the Attorney General or to the Deputy Attorney General or some other official. But, it does not. As for the ultimate decision to proceed with a prosecution after you have exercised your duty to present the matter to a grand jury,

¹ Letter from Deputy Attorney General James Cole to John Boehner, Speaker of the U.S. House of Representatives (June 28, 2012), at 2.

² 2 U.S.C. § 194 (2006) (emphasis added).

³ See *F.T.C. v. Tarriff*, 584 F.3d 1088, 1090-1091 (D.C. Cir. 2009) (defining *shall*: "It is fixed law that words of statutes or regulations must be given their 'ordinary, contemporary, common meaning.' *Williams v. Taylor*, 529 U.S. 420, 431 (2000). It is also fixed usage that 'shall' means something on the order of 'must' or 'will'. See, e.g., Black's Law Dictionary 1407 (8th ed. 2004) (defining 'shall' as 'has a duty to; more broadly, is required to').").

that decision is for the citizens empaneled in the grand jury, not for you or for the Deputy Attorney General or for “the Department” generally to make.

The Deputy Attorney General’s letter cites the President’s assertion of executive privilege as relieving you of your duty to present the contempt citation to a grand jury.⁴ Arguably, that may be true. But, it can only be true to the extent that the assertion of executive privilege is valid as to every single document sought by the House subpoena that has been withheld. The Deputy Attorney General relies on a 1984 Office of Legal Counsel (OLC) opinion, which argues that the duty of a U.S. Attorney to present a contempt citation to a grand jury could not be constitutionally applied where there is a valid assertion of privilege.⁵ However, the OLC opinion clearly sets forth “the caveat that our conclusions are limited to the unique circumstances that gave rise to these questions in late 1982 and early 1983.”⁶ According to the OLC opinion, “a United States Attorney is *not required* to refer a contempt citation *in these circumstances* to a grand jury or otherwise to prosecute an Executive Branch official who is carrying out the President’s instruction *in a factual context such as that presented by the December 16, 1982, contempt citation.*”⁷ Whether or not you are ultimately required by law to refer the contempt citation, nothing in the OLC opinion prohibits you from determining whether the facts here are like those in 1984. Since it is your clear duty under the statute, it is you who must undertake an independent assessment of the facts and circumstances of this case to determine whether there may be important differences between that case and this one, and therefore, the extent to which you may or may not be relieved of your duty by the assertion of executive privilege.

It does not appear possible that you could have undertaken any such independent assessment. The Deputy Attorney General’s letter has put the cart before the horse. As you may or may not know, the Justice Department and the White House have refused to provide a particularized description of the documents being withheld or a description of the documents over which executive privilege has been asserted. No one can reasonably make an intelligent judgment as to the validity of a privilege claim without a specific description of the documents in question, at the very least. As the District Court for the District of Columbia recognized when it considered the contempt citations of White House officials Josh Bolton and Harriet Miers:

[B]oth the Court and the parties will need some way to evaluate privilege assertions going forward in the context of this litigation. More specifically, if the Court is called upon to decide the merits of any specific claim of privilege, it will need a better description of the documents withheld than the one found in Mr. Clement’s letter of June 27, 2007.⁸

⁴ *Id.* at 1.

⁵ 8 Op. O.L.C. 101 (1984) (“*Prosecution for Contempt of Congress*”).

⁶ *Id.* at 102.

⁷ *Id.* (emphasis added).

⁸ Committee on Judiciary, U.S. House of Representatives v. Miers, 558 F.Supp.2d 53, 107 (D.D.C., 2008).

The same principle applies to you in order to evaluate the privilege assertion and thus assess your duty under the statute. Ideally, you would undertake an actual examination of the documents in order to make an independent assessment of the validity of any privilege claim.

The Attorney General has assigned to you the duty of investigating a series of national security leaks. The Attorney General and several members of the Senate Judiciary Committee expressed supreme confidence in your ability to act independently and take the facts wherever they lead, regardless of the political consequences or any pressure to pull punches that might come from the political leadership of the Department or from the White House. Your independence and integrity were cited as the reason that there was supposedly no necessity to appoint a special prosecutor. This matter gives you an opportunity to live up to that high praise and prove your independence.

However, the way this has been handled so far suggests no such independence at all. Before you have even received the citation, before you have even had a chance to understand the scope of the documents and the privilege claim at issue, the Deputy Attorney General has already announced the decision of "the Department" not to proceed as required by the contempt statute. Therefore, so that Congress can have a better understanding of the procedural standing of this matter, please provide answers to the following questions:

- 1) Have you had any communications with the Deputy Attorney General, the Attorney General, or other senior Department political appointees about the contempt citation or about Operation Fast and Furious? If so, provide a detailed description of those communications and when they occurred.
- 2) Have you been instructed not to present the contempt citation to a grand jury? If so, when, by whom, and on what grounds?
- 3) Have you independently decided not to present the contempt citation to a grand jury? If so, when and on what basis?
- 4) Have you conducted an independent review of the documents being withheld from Congress by the Attorney General in order to assess the validity of any privilege claims? If so, when did that review occur? If not, please explain why not.
- 5) Have you been provided with copies of the documents the Attorney General is withholding from Congress or a specific list of the documents being withheld? If so, have you conducted an independent analysis of the executive privilege claim? If not, how can you conduct an independent assessment of the validity of any executive privilege claim or make any independent judgment about your duty under the contempt statute to present the contempt citation to a grand jury?

Please provide written responses to each of these questions as soon as possible, but no later than July 3, 2012. Thank you for your prompt attention to this important matter. If you have any questions concerning this matter, please contact Jason Foster of my staff at (202) 224-5225.

Sincerely,



Charles E. Grassley
Ranking Member

cc: The Honorable John A. Boehner
The Honorable Patrick J. Leahy
The Honorable Darrell E. Issa
The Honorable Elijah E. Cummings